

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KELLI BURNS,

Grievant,

vs.

DOCKET NO. 2013-1552-LinED

**LINCOLN COUNTY BOARD
OF EDUCATION,**

Respondent.

DECISION

Kelli Burns, Grievant, filed this grievance at level three against her employer, Respondent, Lincoln County Board of Education (“Respondent” or “Board”), on or about March 11, 2013. In her grievance, she claims that she was improperly dismissed from her position as an English teacher at Guyan Valley Middle School.¹ Grievant specifically claims that she was dismissed without good cause and she requests “[t]o be made whole, including removal of all discipline, back pay with interest & all benefits restored.”

A level three hearing was held on June 14, 2013, August 28, 2013, November 8, 2013, and February 3, 2014 before the undersigned Administrative Law Judge. Grievant appeared in person and by her representative, Gordon Simmons of the West Virginia Public Workers Union. Respondent appeared by its counsel, Rebecca M. Tinder, Esquire, Bowles Rice McDavid Graff & Love, LLP. This matter became mature

¹ Grievant Kelli Burns was notified by letter dated January 25, 2013, from Patricia Lucas, Superintendent of Lincoln County Schools (“Superintendent Lucas”), that she was suspended without pay and that the Superintendent would recommend that the Board ratify the suspension and approve the termination of Grievant’s contract of employment. The Board conducted a pre-disciplinary hearing on Superintendent Lucas’s recommendations and the transcript from that hearing was made part of the record herein. On March 7, 2013, the Board ratified and approved Grievant’s suspension and termination based upon information substantiating Grievant’s poor performance and failure to improve.

for consideration on April 14, 2014, the date proposed findings of fact and conclusions of law were due. Both parties have submitted their proposals.

Synopsis

Respondent contends that Grievant was terminated from employment for unsatisfactory performance. Respondent relies on evidence from two of Grievant's supervising principals, an assistant principal, and one of Grievant's mentor teachers as support for the proposition that Grievant failed to improve her performance during the time she spent teaching in Respondent's schools. Grievant argues that her discharge was contrary to the provisions of W. Va. Code § 18A-2-12 because Respondent's evaluations of her were improper, she was not given an opportunity to improve her performance through an improvement plan, and Respondent considered factors extraneous to those relevant to performance in terminating Grievant's employment.

Grievant was terminated for unsatisfactory performance. The record established that Grievant's colleagues acknowledged her as extremely intelligent, that her unsatisfactory conduct was correctable, and that she made efforts to improve her work performance. The record also established that Grievant was subjected to unfair scrutiny by at least one of her supervising principals inconsistent with state policy requiring that personnel evaluations be open and honest and that improvement plans be implemented for the purpose of correcting deficiencies. Based upon the sequence of events and circumstances considered by Respondent, Grievant's discharge was contrary to the provisions of W. Va. Code § 18A-2-12 because Grievant was not given a meaningful opportunity to improve her performance under a validly administered improvement plan.

Respondent exercised its authority to dismiss Grievant in an unreasonable fashion, and was arbitrary and capricious. The grievance is **GRANTED**.

The following Findings of Fact are based upon the record developed at level one and level three.

Findings of Fact

1. Prior to her employment with the Board, Grievant was employed by the McDowell County Board of Education from September 2008 to September 2010, approximately two (2) school years.

2. Grievant joined the McDowell County Board of Education from West Virginia's Transition to Teaching Program ("Transition to Teaching"), an alternative teacher certification program that worked with targeted school districts to place and certify qualifying participants in the classroom. The Transition to Teaching Program trained professionals to transition from other employment into public school teaching while taking classes, attending training and meetings, and collaborating with other members of a given cohort.

3. Grievant was hired as a regular English teacher with the Board at Harts Intermediate on October 4, 2010. Her effective date with the Board was September 28, 2010, and she was assigned to teach Reading/Language Arts, or English, to students in grades 6-8.

4. Devonne Brown Parsons was the principal at Harts Intermediate in the 2010-2011 school year, Grievant's first year with the Board.

5. Deborah Dingess was the principal at Harts Intermediate in the 2011-2012 school year, Grievant's second year with the Board.

6. Grievant's 2010-2011 school year, during which she was under the supervision of Principal Devonne Brown Parsons, was not the subject of much scrutiny by Respondent.

7. Ms. Parsons described Grievant as an intelligent, capable teacher who implemented the Twenty-First Century Teaching method that she was trained to use in the classroom. Ms. Parsons testified that the Twenty-First Century Teaching method is not as regimented as traditional methods of classroom teaching and might appear chaotic to some.² The Twenty-First Century Teaching method uses project-based learning, with students engaged in different activities at the same time, as opposed to traditional learning-focused instruction.

8. In mid-September 2011 while working for Principal Dingess, behavioral management issues were recognized in Grievant's classroom. Principal Dingess modeled a class for Grievant and, according to the principal, the students behaved during the modeled lesson. On the following day, the students exhibited the same behavioral management issues as before the modeled lesson.

9. Principal Dingess conducted her first formal observation of Grievant's classroom on October 17, 2011. The principal determined that Grievant was unsatisfactory in Classroom Climate, Instructional Management Systems, Student Progress, Professional Work Habits, and Technology Standards.³

² The West Virginia Department of Education's commitment to Twenty-First Century Instruction and Learning in all Public Schools is found at *W. Va. Code* § 18-2E-7 and states that students must be equipped to live in a multitasking, multifaceted, technology-driven world and that teachers must be competent in twenty-first century content and learning skills to fully integrate technology to transform instructional practice. *W. Va. Code* § 18-2E-7(a)(5) and (8).

³ Testimony from various witnesses throughout the proceeding shows that Grievant was one of the more technologically adept teachers at Harts Intermediate in 2011-2012.

10. On October 24, 2011, Principal Dingess met with Grievant to discuss the observation and to discuss an improvement plan.

11. In early November 2011,⁴ Principal Dingess met with Grievant to discuss complaints she received from the parents of some of Grievant's students who were upset because Grievant was talking with students about inappropriate subject matter. According to Principal Dingess, Grievant admitted to having discussions with her students that were inappropriate.

12. In early December 2011, despite having conducted only one classroom observation of Grievant, Principal Dingess met with Grievant and Sid Fragale, an American Federation of Teachers representative, for the purpose of placing Grievant on a plan of improvement. Mr. Fragale informed Principal Dingess that she could not place Grievant on a plan of improvement without first giving her an evaluation.

13. Despite her years of experience with the Board, Principal Dingess was unaware of West Virginia's requirements for implementing a plan of improvement and she contacted the Office of the West Virginia Board of Education ("WVBE") for assistance. The WVBE confirmed that Principal Dingess could not place Grievant on a plan of improvement.

14. According to Respondent, the parties agreed that the principal's "proposed" improvement plan, drafted in October 2011 without Grievant's input, would be treated as an informal "Remediation Plan."⁵ Principal Dingess intended for the "Remediation Plan" to help Grievant improve in all areas the principal identified as unsatisfactory.

⁴ Principal Dingess was uncertain about some of the dates on which she met with Grievant.

⁵ As will be addressed later in this order, the system by which Grievant's work performance was to be measured does not include a "Remediation Plan."

15. On December 6, 2011, immediately after making an improper attempt to place Grievant on a plan of improvement, Principal Dingess conducted a second formal observation of Grievant's class. Principal Dingess met with Grievant on December 12, 2011 and discussed the observation. The principal once again documented that Grievant had issues with Classroom Climate, Instructional Management Systems, Student Progress, Professional Work Habits, and Technology Standards.

16. From January 2012 through May 2012, Grievant had a mentor teacher, Robin Toney, in her classroom approximately once per week. Ms. Toney was available to help Grievant improve her professional skill and she also modeled lessons for Grievant's class.

17. Principal Dingess observed Grievant's classroom a third time on January 17, 2012. Principal Dingess found that Grievant had issues with Classroom Climate, Instructional Management Systems, and Student Progress, three of the problem areas identified in prior observations. The principal discussed this observation with Grievant on that same day, January 17, 2012.

18. Also on January 17, 2012, Principal Dingess documented Grievant's performance in a Teacher Evaluation covering the period from August 2011 through January 2012. Consistent with her observations, the principal evaluated Grievant as unsatisfactory in Classroom Climate, Instructional Management Systems, and Student Progress.

19. Following the Teacher Evaluation on January 17, 2012, Principal Dingess and Grievant met and discussed the contents of a newly proposed improvement plan that would be implemented from January through May 2012.

20. According to Principal Dingess, as she and Grievant reviewed the principal's proposed plan, which was already in draft form, input was solicited from Grievant; however, Grievant chose not to propose additions or deletions to the plan provisions. Nor was a teacher of Grievant's choice involved in the preparation or implementation of the improvement plan developed by Principal Dingess.

21. Principal Dingess stated that she asked Grievant which teacher she wanted to participate on her improvement "team" and that it was not until May 2012 that Grievant finally chose her mentor teacher, Robin Toney, to participate in the process.

22. During the January 2012 – May 2012 semester, Principal Dingess also repeatedly asked Grievant for a particular date and time that Grievant would prefer that she observe her class.

23. Principal Dingess testified that she wanted Grievant to be fully prepared to implement a good lesson plan for the day of observation so that she could "give" Grievant a good observation.⁶ Grievant consistently represented to the principal that she did not want to be observed in such a manner, as she felt it would be "acting."

24. During Grievant's time at Harts Intermediate, Principal Dingess received oral and written complaints from some parents of Grievant's students, as well as from the students themselves, stating that Grievant was not teaching them and that she was "inappropriate" in the classroom.⁷

25. As to the students who made complaints, Principal Dingess testified that kids are like everybody, they sometimes lie and exaggerate the truth.

⁶ In particular, Principal Dingess testified that she wanted to "catch" Grievant "being good."

⁷ Details of the "complaints" Principal Dingess received were not presented at the level three proceeding.

26. Also in the spring semester of 2012, Grievant was reprimanded by Principal Dingess, in writing, by letter dated May 1, 2012, for insubordination and dereliction of duty for failure to record student grades appropriately after several reminders and warnings.

27. With Grievant's improvement plan set to expire at the end of May, Principal Dingess observed Grievant's class on May 22, 2012, and documented issues with Programs of Study, Classroom Climate, Instructional Management Systems, Student Progress, and Communication.

28. The very next day, on May 23, 2012, Principal Dingess observed Grievant's class again and documented that Grievant continued to have issues with Programs of Study, Classroom Climate, Instructional Management Systems, and Technology Standards.

29. On May 29, 2012,⁸ following the completion of the January 2012 improvement plan, Principal Dingess observed and evaluated Grievant. Principal Dingess found that Grievant was unsatisfactory in the following areas: Programs of Study, Classroom Climate, Instructional Management Systems, Student Progress, Professional Work Habits, and Technology Standards.

30. On that same date, Principal Dingess presented Grievant with a second formal improvement plan that she had already prepared. Neither Grievant nor an improvement "team" was involved in the development of this second improvement plan,

⁸ The rapid sequence of observations and meetings to which Grievant was subjected is apparent when the dates at issue are considered in the context of the school calendar. May 29, 2012 marked only the third school day after the principal's back-to-back observations of Grievant's class. May 24, 2012 and May 25, 2012, respectively, were Thursday and Friday, and May 28, 2012 was the Memorial Day holiday.

which was to be implemented during the first semester of the next school year, from August 2012 through January 2013.

31. When Principal Dingess reviewed the second proposed improvement plan with Grievant, she solicited her input. Grievant did not propose any additions or deletions to the plan provisions developed by the principal.

32. Because of what Grievant perceived to be unfair treatment and scrutiny by Principal Dingess and in an effort to make a fresh start with a new principal, Grievant successfully bid on an opening in an English/Language Arts position and transferred from Harts Intermediate to Guyan Valley Middle School for the 2012-2013 school year.

33. Grievant believed the second proposed plan of improvement, which was prepared by Principal Dingess and intended to cover the following school semester, from August 2012 through January 2013, was invalid and would not follow her to Guyan Valley Middle School.

34. During the summer prior to starting school in August 2012, Grievant participated in trainings related to the Twenty-First Century Teaching method, served as an English Department facilitator, and was voted in as a faculty liason for Guyan Valley Middle School.

35. Also during the summer, Grievant learned from the Principal of Guyan Valley Middle School, Jonah Adkins, that she would be subject to the second improvement plan prepared by Principal Dingess.

36. Principal Adkins testified that he had never before administered a plan of improvement but that, prior to August 2012, he was made aware of Grievant's second improvement plan from Harts Intermediate.

37. For the 2012-2013 school year, Guyan Valley Middle School had been chosen by the WVBE to serve as a pilot program for implementation of a new method of teacher evaluation that was ultimately adopted statewide. All members of Guyan Valley Middle School faculty, except for Grievant, were trained in the new method of teacher evaluation prior to the start of the school year.

38. Principal Adkins testified that, based on the existing improvement plan, he chose to exclude Grievant from the new program for teacher evaluations, and to simply adopt the Harts Intermediate improvement plan provisions without change and without identifying improvement “team” participants or another member of the faculty to assist Grievant at Guyan Valley Middle School.

39. Grievant objected to the application of the plan of improvement at her new school and that was not provided a Guyan Valley Middle School faculty member to support her in meeting the performance criteria outlined in the plan.

40. On August 29, 2012, shortly after the school year began, Principal Adkins observed Grievant’s class for the first time. Principal Adkins documented that Grievant had issues with Classroom Climate, Instructional Management Systems, and Professional Work Habits.

41. Less than one month later, on September 20, 2012, Principal Adkins observed Grievant’s class and again documented issues with Programs of Study, Classroom Climate, and Instructional Management Systems.

42. According to Principal Adkins, the parents of some Guyan Valley Middle School students complained to him that Grievant engaged in inappropriate behavior or rapport in the classroom, and that her classes were poorly managed.

43. On January 9, 2013, Principal Adkins wrote Grievant a formal letter of reprimand citing her failure to produce written lesson plans when asked for them.⁹

44. Three school days later, on January 14, 2013, Principal Adkins conducted a third observation of Grievant's class and documented that she had issues with Programs of Study, Classroom Climate, Instructional Management Systems, Student Progress, and Technology Standards.

45. On the next day, January 15, 2013, Principal Adkins evaluated Grievant and documented that she had issues in Programs of Study, Classroom Climate, Instructional Management Systems, Student Progress, and Technology Standards.

46. During her employment with Respondent, Grievant was given several professional development and guidance opportunities. These were in addition to the coaching, training, and educational activities Grievant had available to her through the Transition to Teaching Program.

47. Respondent relies on testimony from Grievant's mentor teacher, both supervising principals, and the most recent assistant principal for the proposition that Grievant failed to improve her performance during the time she spent teaching in their respective schools. The Board specifically states that "[e]very employee assigned to assist, coach, mentor, and train the grievant" indicated that the Grievant failed to

⁹ Both of Grievant's supervising principals testified to the significance of Grievant's failure to utilize detailed written lesson plans on a daily basis. Yet, an announced OEPA audit conducted at Guyan Valley Middle School on October 23, 2012 at the direction of the WVBE found that *only two* teachers at the school were using daily lesson plans and the remaining teachers were using unit plans that could not be followed by a substitute teacher. See *OEPA Initial Education Performance Audit Report for Guyan Valley Middle School, Lincoln County School System, December 2012*, Section 7.2.3 at p. 8. The audit report states that while lesson information was included in unit plans, it was impossible in most cases to determine the daily lessons and what was to be taught. *Id.* (OEPA Audit Reports are publicly available at the website for the West Virginia Office of Education Performance Audits, <http://oeпа.state.wv.us/>. In the instant proceeding, Grievant and at least one of Grievant's witnesses made reference to negative audit findings for both Harts Intermediate and Guyan Valley Middle School, the two schools at issue with Grievant.)

improve her performance in spite of “having the intelligence to do so.” *Resp. Proposed Findings of Fact & Conclusions of Law, Para. 38.*

48. By letter dated January 25, 2013, Superintendent Lucas of Lincoln County Schools, notified Grievant that she was suspended without pay due to her failure to improve and reach satisfactory levels of performance in accordance with two formal improvement plans. Superintendent Lucas’s letter further notified Grievant that the superintendent was recommending the termination of Grievant’s contract of employment with the Board.

49. According to Respondent, Superintendent Lucas took this action against Grievant after she was provided “every conceivable resource to assist her in improving her performance.”

50. On February 21, 2013, March 2, 2013, and March 7, 2013, the Board conducted a pre-disciplinary hearing on the recommendations of Superintendent Lucas, which hearing transcript was made part of the record herein.

51. On March 7, 2013, the Board, by a unanimous vote, ratified and approved Grievant’s suspension and termination based on information that substantiated the Grievant’s poor performance and her failure to improve.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Procedural Rules of the W. Va. Public Employees Grievance Bd.* 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995).

“A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying determines the weight of the testimony.” *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, “[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations is beneficial if not required. *Jones v. W. Va. Dep’t of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep’t of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep’t of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witnesses’ testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness.

Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

A Board's authority to discipline an employee must be based on one or more of the causes listed in *W. Va. Code* § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 3, in part, *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 278 (1975); Syl. Pt. 7, in part, *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, 223 W. Va. 431, 675 S.E.2d 907 (2009).

Generally, a Board of Education acts arbitrarily and capriciously when it does not rely on criteria intended to be considered, explains or reaches a decision in a manner contrary to the evidence before it, or reaches a decision that was so implausible that it cannot be ascribed to a difference of opinion. *Yokum v. W. Va. School for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996); See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985).

Respondent contends that the findings contained in the evaluations of Principals Dingess and Adkins, bolstered by complaints from parents and students about Grievant's inappropriate classroom conduct and the opinions of Board administrators and staff that Grievant failed to improve her teaching performance, are sufficient to substantiate the charge of unsatisfactory performance. Grievant counters that, based upon the sequence of events leading to her termination and upon hearsay allegations

concerning matters irrelevant to her work performance, namely Grievant's sexual orientation, her dismissal was contrary to the provisions of W. Va. Code § 18A-2-12 because she was not given a meaningful opportunity to improve her performance under an improvement plan.

W. Va. Code § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have the authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." W. Va. Code § 18A-2-8 states, in part, that:

(a) Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.

(b) A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. The charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board.

W. Va. Code § 18A-2-12(h) states:

Any professional whose performance evaluation includes a written improvement plan *shall* be given an opportunity to improve his or her performance through the implementation of the plan.... (Emphasis added.) If the evaluation shows that the professional is still not performing satisfactorily, the evaluator shall make additional recommendations for improvement or may recommend the dismissal of the professional in accordance with the provisions of section eight of this article.¹⁰

¹⁰ W. Va. Code § 18A-2-12 was amended in 2012. However, the cited paragraph was not affected by the amendment and has been in effect throughout Grievant's teaching career.

West Virginia Board of Education (“WVBE”) Policy 5310¹¹ states that “monitoring and/or observation of employees *shall* be conducted openly” and that “[a]n employee whose performance evaluation is rated unsatisfactory *shall* be given an opportunity to correct the deficiencies.” (Emphasis added.) An evaluation is properly conducted if it is performed in an “open and honest” manner, and is fair and professional. See, W. Va. Code § 18A-2-12. See also, *Brown v. Wood County Bd. of Educ.*, Docket No. 54-86-262-1 (May 5, 1987), *aff’d* Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), *aff’d*, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990); *Wilt v. Flanigan*, 170 W. Va. 385, 294 S.E.2d 189 (1982). The mere fact that a Grievant disagrees with his unfavorable evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. See, *Romeo v. Harrison County Bd. of Educ.*, Docket No. 17-88-013 (Sept. 30, 1988).

“The Grievance Board will not intrude on the evaluations and Improvement Plans of employees unless there is evidence to demonstrate ‘such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded.’ *Kinder v. Berkeley County Bd. of Educ.*, Docket No. 02-87-199 (June 16, 1988). See, *Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier Bd. of Educ.*, Docket No. 13-87-313-4 (Feb. 22, 1988); *Brown v. Wood County Bd. of Educ.*, Docket No. 54-86-262-1 (May 5, 1987), *aff’d* Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), *aff’d*, in part, 184 W. Va. 205,

¹¹ WVBE Policy 5310 is the State Board’s adopted “system for the evaluation of the employment performance of personnel, which system shall be applied uniformly by county boards in the evaluation of the employment performance of personnel employed by the board.” W. Va. Code § 18A-2-12(a). All citations from Policy 5310 are from the 2006 version of the policy, which was in effect throughout Grievant’s teaching career. The current version of 5310 was not effective until 2013, after Grievant’s termination. The 2012 amendment to W. Va. Code § 18A-2-12(a) was purely technical and either version of the statute is applicable.

400 S.E.2d 213 (1990).” *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31. 1999).

Additionally, dismissal of an employee under W. Va. Code § 18A-2-8 “must be based upon the just causes listed therein and *must be exercised reasonably*, not arbitrarily or capriciously.” Syl. Pt. 3, in part, *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975) (Emphasis added); Syl. Pt. 4, in part, *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, ___ W. Va. ___ 675 S.E.2d 907 (2009). “The factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows [his] responsibilities, and is competent to perform them, but elects not to complete them. When an employee’s performance is unacceptable because [he] does not know the standards to be met, or what is required to meet the standards, and [his] behavior can be corrected, the behavior is unsatisfactory performance.” *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 01-19-595 (May 17, 2002).

With respect to unsatisfactory performance, the West Virginia Supreme Court of Appeals has found reversible error in the event an Administrative Law Judge does not assess whether a Grievant’s behavior was correctable pursuant to the State Board of Education Policy 5300.¹² *Maxey, supra*. In addition, “[f]ailure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy 5300 ... prohibits such board from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to

¹² That policy is now referred to as Policy 5310, 126 C.S.R. 142. It is worth noting that the legislature codified the specific improvement plan language from Policy 5300 in W. Va. Code § 18A-2-12a(b)(6).

the attention of the employee through evaluation, and which is correctable.” *Id.* “A board must follow the West Virginia Board of Education Policy 5300 ... procedures if the circumstances forming the basis for suspension or discharge are correctable. The factor triggering the application of the evaluation procedure and correction period is correctable conduct. What is correctable conduct does not lend itself to an exact definition but must be understood to mean an offense or conduct which affects professional competency.” *Id.* Policy 5300 “envision[s] that where a teacher exhibits problematic behavior, the improvement plan is the appropriate tool if the conduct can be corrected. Only when these *legitimate efforts fail* is termination justified.” *Id.* (Emphasis added.)

West Virginia Code § 18A-2-12a states:

(6) All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve of this article. All school personnel are entitled to opportunities to improve their job performance prior to termination or transfer of their services. *Decisions concerning the promotion, demotion, transfer, or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto.* All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion (Emphasis added.)

The Court discussed Policy 5300 in *Mason County Bd. of Educ. v. State Superintendent of Sch.*, 165 W. Va. 732 (W. Va. 1980) where it wrote: “What is ‘correctable’ conduct does not lend itself to an exact definition but must, in view of the nature of the conduct examined in *Trimboli, supra*,¹³ and in *Rogers, supra*,¹⁴ be understood to mean an offense of conduct which affects professional competency.” *Id.* at 739. As to what

¹³ *Trimboli v. Bd. of Educ. of the County of Wayne*, 163 W. Va. 1, 254 S.E.2d 561 (1979).

¹⁴ *Rogers v. Bd. of Educ.*, 125 W. Va. 579, 25 S.E.2d 537 (1943).

constitutes “correctable” conduct, the Court noted that “it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct complained of involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner.” *Id.*

Concerning the procedure for the development of teacher improvement plans, Policy 5310 provides the following:

§ 126-142-11. Improvement Plan for Classroom Teachers.

11.1. An improvement plan shall be developed by the supervisor and teacher when a teacher’s performance is unsatisfactory in any area of teacher responsibility as contained in § 126-142-13.

11.2. The improvement plan shall designate how the teacher shall meet the criteria. The improvement plan shall:

11.2.1. identify the deficiency(ies),

11.2.2. specify the corrective action to remediate the deficiencies,

11.2.3. contain the time frame for monitoring and deadlines for meeting criteria, but in no case shall an improvement plan be for more than one (1) semester in length, and

11.2.4. describe the resources and assistance available to assist in correcting the deficiency(ies).

11.3 After a teacher has successfully corrected deficiency(ies) the teacher must continue to meet standards.

As to teacher responsibilities, Policy 5310 provides the following:

§ 126-142-13. Classroom Teachers’ Responsibilities.

13.1. Job descriptions for teachers shall include the following responsibilities:

13.1.1. implements programs of study,

13.1.2. fosters a classroom climate conducive to learning,

13.1.3. utilizes instructional management systems models that increase student learning,

13.1.4. monitors student progress towards a mastery of instructional goals and objectives,

13.1.5. communicates effectively within the educational community, and with parents on a regular basis,

13.1.6. meets professional responsibilities, and

13.1.7. effective July 1, 2003, demonstrates competency in the knowledge and implementation of technology standards.

In her third year of teaching, the 2010-2011 school year, Grievant was required to be observed three times for each evaluation and was required to have a minimum of two (2) evaluations per year. WVBE Policy 5310 §§ 9.1, 9.2. As a fourth and fifth year teacher, Grievant was required to be observed two times for each evaluation and was required to have a minimum of one (1) evaluation per year. WVBE Policy 5310 §§ 9.1, 9.3. Evaluations must identify deficiencies and provide written recommendations for meeting performance criteria and characteristics. WVBE Policy 5310 § 10.1.

Any improvement plan “shall be developed by the supervisor and teacher when a teacher’s performance is unsatisfactory in any area of teacher responsibility.” WVBE Policy 5310 § 11. Evaluations and subsequent Improvement Plans “are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students.” *Baker v. Fayette County Bd. of Educ.*, Docket No. 94-10-427 (Jan. 24, 1995).

It is worth noting that for Grievant’s first year with Respondent Board, the Board was not independent and had been functioning under the oversight of the West Virginia

Board of Education (WVBE) for several years. At a WVBE meeting on June 8, 2000, the state seized control of the Board because of rundown buildings, illegal hiring practices, and low student test scores. W. Va. Bd. of Educ. Meeting Minutes (June 8, 2000). Provisional control was returned to the Board in December 2010 on the condition that the Office of Education Performance Audits (OEPA) would continue to review personnel areas to assure that the Lincoln County School District and the Board adhere to personnel requirements of the W. Va. Code and WVBE policies. W. Va. Bd. of Educ. Meeting Minutes (July 13, 2011).

During reviews in March, April, and May of 2011, an OEPA team identified continued personnel issues with Respondent Board. *Id.* The WVBE voted to extend its oversight of the Board and Lincoln County Schools for two more years. *Id.* In December 2012, following an announced OEPA audit of Lincoln County Schools in October 2012, the WVBE agreed to release the Board from provisional oversight by the state and that the county be issued full approval status. W. Va. Bd. of Educ. Meeting Minutes (December 12, 2012). Because the Board was under WVBE oversight and its schools were subject to OEPA audits throughout the relevant time period, Grievant's supervising principals communicated regularly with administrators for Respondent and, occasionally, with the WVBE.

A review of the evidence shows that Grievant and at least one supervising principal responsible for her professional evaluations, Principal Dingess of Harts Intermediate, had issues between them that can best be characterized as something more than a personality conflict. Notably, the classroom performance issues offered as grounds for Grievant's discharge did not seem to manifest during Grievant's first year

with the Board or while working for a different principal. Yet, after starting the 2011-2012 school year, Principal Dingess identified what she considered to be professional deficiencies with Grievant and conducted observations of Grievant's classroom, finding her unsatisfactory in five areas. During this same time frame, parents of some of Grievant's students complained to Principal Dingess about Grievant's conduct and demeanor in general and also complained that Grievant talked with their children about inappropriate subject matter.¹⁵ Although the undersigned does not question that some Lincoln County parents and students complained to Principal Dingess and others about Grievant, the record shows that the nature of the complaints generally focused on personal objections to Grievant rather than legitimate concerns related to her professional competency.

Whether the result of a personality conflict between the principal and Grievant, the parental complaints related to Grievant's classroom rapport with students, or something else entirely, the evidence shows that Principal Dingess subjected Grievant, a relatively inexperienced teacher, to a level of scrutiny that is inconsistent with the purpose of state policy that requires personnel evaluations to be open and honest, fair and professional, and conducted with the goal of identifying and correcting professional deficiencies. The undersigned did not find Principal Dingess credible as to her

¹⁵ Details of the "complaints" Principal Dingess received were not presented at the level three proceeding. The record also established that similar complaints were made to Principal Adkins by parents at Guyan Valley Middle School. Given evidence and testimony presented in the lengthy level one hearing before the Board, which followed Grievant's recommended discharge in early 2013, it seems fair to note that Grievant's status as a lesbian was frequently commented on or referenced by Lincoln County students and parents, and, on occasion, by faculty and administrators. It is not necessary to address the nature of any alleged "complaint" about Grievant, whether founded in small-town rumor or truth, because the Board's purported reason for Grievant's discharge was limited to unsatisfactory work performance, within the meaning of *W. Va. Code* § 18A-2-8(b). The Board's basis for Grievant's discharge *did not* include allegations of immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, or a felony conviction of any type, as referenced in *W. Va. Code* § 18A-2-8(a).

testimony that she did everything she could to assist Grievant in improving her deficiencies, particularly since her first action was to unilaterally draft an improper “improvement plan” without first making sure that she understood the state policy governing teacher evaluations.

Throughout this proceeding, the undersigned noted several instances that exemplify the unreasonable scrutiny applied by Respondent to Grievant’s classroom performance. Obviously, one such instance is Principal Dingess’s initial, rushed attempt to place Grievant on an improper performance improvement plan without following established policy and procedure for evaluations. Another example that shows the evaluation process applied to Grievant was not fair and professional is Principal Dingess’s patronizing testimony that she offered to “catch” Grievant “being good” by prescheduling an observation. That Principal Dingess, a professional administrator who admittedly misunderstood and misapplied state policy governing teacher evaluations and plans of improvement, would make such a statement to Grievant as she was trying to settle into a new school and improve her teaching skills, suggests that the principal viewed her evaluations of Grievant as a game.

Additional evidence that Grievant’s performance was scrutinized differently than what is contemplated by applicable policy is found in the manner by which plans of improvement were created for Grievant. They were not developed in a cooperative manner with the input of Grievant or any teacher designated to serve as her mentor or member of faculty support – they were drafted by Principal Dingess and simply presented to Grievant for comment, recommendations, and implementation. That in

and of itself is inconsistent with a system intended to improve a professional teacher's classroom performance once that performance is deemed deficient but correctable.

The timing and sequence of Principal Dingess's observations of Grievant's classroom also shows that the evaluation and improvement system was being used as a disciplinary tool, rather than in a constructive manner. Within days of trying to place Grievant on an improper plan of improvement, on December 6, 2011, Principal Dingess conducted the second of three successive unsatisfactory observations.¹⁶ A third unsatisfactory observation was conducted on January 17, 2012, which was discussed with Grievant on that same day, and which was immediately documented in an unsatisfactory Teacher Evaluation, also dated January 17, 2012.

Principal Dingess then met with Grievant and discussed the contents of a proposed improvement plan to be implemented from January through May 2012. As with the informal "Remediation Plan," the proposed improvement plan was already in draft form and was not developed with Grievant's input or that of a mentor teacher. After continued, unsubstantiated complaints from parents and students about Grievant, Principal Dingess conducted three observations of Grievant's classroom in rapid succession. With Grievant's plan of improvement set to expire at the end of May 2012 and without having conducted any formal observation of Grievant since January 17, 2012, Principal Dingess conducted and documented unsatisfactory observations on May 22, 2012, May 23, 2012, and May 29, 2012, respectively. The third unsatisfactory

¹⁶ The first unsatisfactory observation by Principal Dingess of Grievant's classroom performance was on October 17, 2011, which immediately preceded her meeting with Grievant in early November 2011 to discuss parental complaints about Grievant's classroom discussions with students. It is on the basis of that October 17, 2011 observation that Principal Dingess improperly attempted to place Grievant on a plan of improvement.

observation on May 29, 2012 occurred within only two school days of the back-to-back observations from the prior week.

Under the circumstances, there is no likelihood that Grievant was provided a meaningful opportunity to improve her teaching performance given the manner in which Principal Dingess applied the evaluation system and plan of improvement process. Importantly, Grievant was not a seasoned educator but one who earned her teaching credentials through an alternative teacher certification program that recognizes the benefit of employing individuals in West Virginia's schools who have not completed formal teacher education degree programs. While that fact does not diminish Grievant's substantive knowledge or professional qualifications, it offers one reason as to why Grievant may have exhibited weakness in terms of pedagogical knowledge, including classroom management. But without a meaningful opportunity to implement the provisions of a legitimate improvement plan and to improve her skills in the classroom, the evaluation system applied to Grievant was punitive and contrary to state law. The futility of the evaluation process as administered by Principal Dingess eventually caused Grievant to bid into a job at another school in order to receive a fresh start and evaluations that were fair and professional.

However, once at Guyan Valley Middle School, Principal Adkins and the Board seemed to place Grievant under similar scrutiny. Principal Adkins chose to apply to Grievant the previously drafted improvement plan as she started with Guyan Valley Middle School even though he had never before administered *any* improvement plan, the improvement plan was created for Harts Intermediate, and application of the improvement plan required that Grievant be the only faculty member excluded from the

newly implemented system of teacher evaluation and improvement. Also, Grievant was not provided a mentor teacher for her new school until approximately October 5, 2012, after Principal Adkins had already twice observed Grievant's classroom, and the assigned mentor was not the faculty member Grievant requested and with whom she was already familiar. With faculty being trained on the new evaluation system prior to the school year and with no improvement "team" assembled or mentor teacher assigned, Principal Adkins could have easily presented Grievant with an opportunity for meaningful improvement and professional development. Instead, Grievant was excluded from the new evaluation process and subjected to a plan that was flawed in its development and that had already proved to be completely ineffective at improving Grievant's job performance.

Principal Adkins also conducted three (3) formal observations of Grievant, on August 29, 2012, September 20, 2012, and January 14, 2013, respectively, before issuing her an unsatisfactory evaluation on January 15, 2013. As a fourth year teacher, Grievant should have been observed only twice for the January 15, 2013 evaluation. See WVBE Policy 5310 §§ 9.1, 9.3. Between his September 20, 2012 and January 14, 2013 observations of Grievant's classroom, on January 9, 2013, Principal Adkins issued Grievant a letter of reprimand citing Grievant's failure to produce written daily lesson plans when asked for them. Notably, a December 2012 report issued by the OEPA shows that during its October 23, 2012 audit of Guyan Valley Middle School, *only two* teachers at the school were using daily lesson plans, and that the unit plans used by the remaining teachers could not be followed by a substitute teacher. See *OEPA Initial Education Performance Audit Report for Guyan Valley Middle School, Lincoln County*

School System, December 2012, Section 7.2.3 at p. 8. The audit further found that it was impossible in most cases to determine teachers' daily lessons and what was to be taught. *Id.* Although Principal Adkins reprimanded Grievant for failing to produce a daily lesson plan when she was asked, prior to his final negative observation and evaluation of her performance, there is no evidence that he likewise issued reprimands to all other faculty members who also failed to utilize appropriate lesson plans.

By subjecting Grievant to an invalid improvement plan that was prepared by another principal for a different school, failing to meaningfully engage Grievant in the implementation of any improvement plan, conducting more observations than necessary for his January 15, 2013 unsatisfactory evaluation of Grievant, and issuing Grievant a letter of reprimand for an infraction that was obviously being committed by nearly every faculty member at Guyan Valley Middle School during the relevant time frame, it is apparent that Respondent continued its unreasonable scrutiny of Grievant after she transferred to a new school for a fresh start. Such a heightened level of scrutiny is not consistent with applicable policy when a teacher's classroom performance is deemed deficient but capable of correction, as is the circumstance in this proceeding.

The law is clear that a teacher may only be discharged for unsatisfactory performance where the system for evaluation is properly followed and where a valid improvement plan is implemented with the goal of correcting unsatisfactory conduct. Only when these *legitimate efforts fail* is termination justified. The evidence presented in this case shows that Respondent made no legitimate effort to correct problematic professional behavior, despite having recognized that Grievant's conduct was merely unsatisfactory and capable of improvement. Regardless of the actual motives of

Principals Dingess and Adkins in misapplying the evaluation system to Grievant, it is clear that they were inconsistent with the primary purpose of the evaluation policies and procedures to which they are bound.

The undersigned, as the trier of fact, does not find that Respondent established the charges alleged. In particular, Respondent failed to conduct evaluations of Grievant in an open and honest manner and relied on arbitrary and capricious evaluations to support a decision to discharge. The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In disciplinary matters, Respondent Board bears the burden of establishing the charges by a preponderance of the evidence. *Procedural Rules of the W. Va. Public Employees Grievance Bd.* 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995).

2. An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

3. The Grievance Board has applied the following factors to assess a witnesses' testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the

plausibility of the witness's information. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

4. When grounds for a school employee's dismissal include charges relating to conduct which is deemed correctable, the board of education must establish that it complied with the provisions of WVDE Policy 5310 requiring it to inform the employee of his deficiencies and afford him a reasonable period to improve. *Mason County Bd. of Educ. v. State Supt. of Schools*, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980); See also *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002).

5. WVBE Policy 5310 requires that "monitoring and/or observation of employees ... be conducted openly" and that "[a]n employee whose performance evaluation is rated unsatisfactory shall be given an opportunity to correct the deficiencies." An evaluation is proper if it is performed in an "open and honest" manner, and is fair, and professional. See, W. Va. Code § 18A-2-12. See also, *Brown v. Wood County Bd. of Educ.*, Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990); *Wilt v. Flanigan*, 170 W. Va. 385, 294 S.E.2d 189 (1982).

6. The Board's authority to discipline an employee must be based on one or more of the causes listed in W. Va. Code § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 3, in part, *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 278 (1975); Syl. Pt. 7, in part, *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, 223 W. Va. 431, 675 S.E.2d 907 (2009).

7. Dismissal of an employee under W. Va. Code § 18A-2-8 “must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously.” Syl. Pt. 3, in part, *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, ___ W. Va. ___ 675 S.E.2d 907 (2009).

8. “The factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows [his] responsibilities, and is competent to perform them, but elects not to complete them. When an employee’s performance is unacceptable because [he] does not know the standards to be met, or what is required to meet the standards, and [his] behavior can be corrected, the behavior is unsatisfactory performance. *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 01-19-595 (May 17, 2002).

9. The “[f]ailure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy 5300 ... prohibits such board from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable.” *Maxey, supra*. WVBE Policy “envision[s] that where a teacher exhibits problematic behavior, the improvement plan is the appropriate tool if the conduct can be corrected. Only when these legitimate efforts fail is termination justified.” *Id.*

10. Evaluations and subsequent improvement plans “are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve

the education received by the students.” *Baker v. Fayette County Bd. of Educ.*, Docket No. 94-10-427 (Jan. 24, 1995).

11. County boards of education have the burden of proof to show that conduct was not and is not correctable. *Maxey, supra*.

12. Respondent violated the provisions of W. Va. § 18A-2-12 and applicable WVBE policy when it failed to subject Grievant to an open and honest evaluation process and, once it identified unsatisfactory behavior, when it failed to afford Grievant a meaningful opportunity to correct deficiencies.

13. Grievant’s discharge was not based on a fair observation and evaluation of her performance, and she was not afforded a legitimate improvement period to correct any deficiencies with her performance.

Accordingly, this grievance is **GRANTED**, and Respondent is directed to reinstate Grievant to her position, with an **AWARD** of back pay, seniority, and benefits.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. Va. Code § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See also 156 C.S.R. 1 § 6.20.

Date: October 15, 2014.

Stephanie L. Ojeda
Administrative Law Judge